Supreme Court, U.S.
FILED

001264 JAN 29 2001

No. —

IN THE
Supreme Court of the United States

GREGORY E. WEST,
Petitioner,

vs.

JOHNNIE MOORE, and
AT & T TECHNICAL SERVICES, INC.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

1. Under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?

2. In determining whether to grant summary judgment under Fed. R. Civ. P. 56, should the District Court weigh all the evidence or consider only the evidence favoring the non-movant?

3. Whether the standard for granting judgment as a matter of law under Fed. R. Civ. P. 56 is the same as the standard for granting judgment as a matter of law under Fed. R. Civ. P. 50?

4. Is the Fourth Circuit Court of Appeals bound by the Supreme Court's ruling in *Reeves. v. Sanderson*, or does the unpublished nonprecedential decision issued by the Fourth Circuit Court of Appeals subsequent to the contrary ruling of the U.S. Supreme Court bind the appellant herein while securing his due process rights under the United States Constitution?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the rules of the Supreme Court of the United States.

1. Gregory E. West, Plaintiff/Appellant, Pro Se;

2. Johnnie Moore, Defendant;

3. AT & T Technical Services, Inc., Defendant/Appellee; and

4. Ronda Lynn Brown, Attorney for the Defendant/Appellee.

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OPINIONS BELOW

The August 2, 2000, unpublished nonprecedential Opinion of the United States Court of Appeals for the Fourth Circuit and the August 16, 2000 Plaintiff-Appellant's Petition for Rehearing En Banc are attached as appendices.

JURISDICTION

This court has jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit decided on August 2, 2000, Petition for Rehearing En Banc denied on October 31, 2000, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute construed is Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, which prohibits discrimination because of race and sex.

STATEMENT

The United States District Court for the Eastern District of Virginia issued its order granting Summary Judgment in favor of defendant AT & T Technical Services, Inc. on December 9, 1999. Plaintiff appealed and the United States Court of Appeals for the Fourth Circuit issued an unpublished nonprecedential decision on August 2, 2000 adopting the District Court's findings. Relying on the Supreme Court's June 12, 2000 decision in *Reeves v. Sanderson Plumbing Products, Inc.*, petitioner then sought a rehearing En Banc under Fed. R. App. P. 35 and 40 because a change in the law occurred after the case was submitted, which was overlooked, and the Fourth Circuit Court's decision was in sharp conflict with this court's decision, and other circuits. Rehearing was denied on October 31, 2000.

(FACTS)

Petitioner, Gregory E. West, is a black male who was employed by AT & T Technical Services, Inc., as a Customer Service Representative (Senior Associate, Technical) from March 1994 until his involuntary discharge in April 1998. He was selected to succeed the incumbent of a position which petitioner had held previously for approximately a year and a half, and was assigned to training to prepare for new responsibilities. The training was abruptly terminated and petitioner was replaced by Wendy O'Toole, a white female, lower graded employee of lesser qualifications. O'Toole was immediately scheduled for training to qualify her for the position. Petitioner filed a charge of discrimination based on race and sex. Following pre-trial discovery and depositions

by the defendant, and denial of discovery by the plaintiff, the District Court granted summary judgment for the Defendant. The Fourth Circuit affirmed on the reasoning of the District Court.

Respondent AT & T claimed that Petitioner West was replaced because of the superior qualifications of the female employee. In its attempt to mislead the court for purposes of summary judgment, the defendant proffered false evidence concerning O'Toole's qualifications. The District court found that plaintiff had provided no evidence that defendant's promotion of O'Toole was because of race or gender since O'Toole was better qualified for the position than was the plaintiff due to significantly more experience with switch database programs. Here, the court disregarded plaintiff's clear and convincing evidence, including affidavits from supervisors and co-workers, submitted in opposition to the Motion for Summary Judgment, which proved the employer's reasons to be false.

In Exhibit A to Appendix A, O'Toole's resume', it is reflected that she had four years experience as a Telephone Switch Data Base Manager and a Switch Interface Programmer, performing database management on the following telephone equipment: **25 DVC DBX Secure switches, 5 Intecom S-80 Secure switches, 3 Intecom S-80 Commercial (non-secure) switches, 1 Intecom Telari Secure Switch, 1 AT & T 5ESS Commercial Switch, 1 OCTEL voice Messaging System, performing system level diagnostics on the above listed equipment to isolate malfunctions and assist in capacity planning.**

In Exhibit B to Appendix A, O'Toole's declaration, signed October 29, 1999, O'Toole further contended that she possessed "over five and a half years experience as a telephone switch data base administrator dealing with over 30 switches and multiple classification levels including both secure and non-secure switches." This evidence submitted by

defendant suggests that her experience as a switch data base administrator was acquired shortly after her departure from Marshall's Department Store. However, in Exhibit C to Appendix A, AT & T's performance evaluation of O'Toole, dated and signed on October 4, 1996 by Scott Rice, her supervisor, it is reflected under **"AREAS FOR IMPROVEMENT"**, that O'Toole required training in the "5ESS switch, the IBX switch and the DVC switch. Furthermore, it was recommended that a **"Proposed FY 97/98 training schedule"** include training in (ESS5551X: **CBT INTRODUCTION TO THE 5ESS**, ES5010, ES505A, ES505B, ES505C, ESD505D, ES505E, ES5561), CBT-101: **IBX TECHNICAL ORIENTATION**, DBT-205: **IBX STATION DATA BASE 7 DVC STATION DATABASE**, DBT-302)(6025).

Exhibit C to Appendix A directly conflicts with the claims of switch database experience of O'Toole represented in Exhibits A and B. Exhibit D to Appendix A is a memorandum from Scott Rice, O'Toole's supervisor, to Lydia Baker and Ann Howard on August 19, 1996 showing skill classifications and recommended training for the CTAP group. It not only shows that West was proposed for "journeyman" training as opposed to O'Toole's proposed "apprentice" training for the DVC switches, but also shows that O'Toole had no training in several areas, in particular, the Telari, DVC DBX secure, the IBX S0-80 secure & non-secure switches as alleged in her resume'.

Clearly, O'Toole's resume' and signed declaration misrepresent her true qualifications and skills at the time she replaced West in 1996. This defeats the defendant's proffered reason for placing O'Toole in the position. The evidence presented shows the falsity of defendant's proffered claim that O'Toole was better qualified than he was, and a jury would be entitled to infer the ultimate fact of intentional discrimination. The court failed to consider West's evidence proving the employer's falsity.

I. CERTIORARI SHOULD BE GRANTED SINCE THERE IS A SPLIT IN THE CIRCUITS WITH RESPECT TO WHETHER PROOF OF PREFERENTIAL TREATMENT FOR A MEMBER OF THE PREFERRED CLASS, FOR PRETEXTUAL REASONS, IS SUFFICIENT TO PRESENT AN EMPLOYMENT DISCRIMINATION CASE TO THE JURY.

Regarding the evidence necessary to create a factual issue under Title VII of the Civil Rights Act of 1964, this Court has stated ". . . [R]ejection of defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.'" *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (emphasis added). This court stated in Reeves, ". . . evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation." Further, "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."

Some circuits hold that the language of Hicks means that proof of a prima facie case coupled with proof of pretext is always sufficient to present a jury question. Other circuits disagree, and require direct evidence of discriminatory intent.

The Fourth Circuit is one of the circuits using the "pretext-plus" (direct evidence) test for determining the sufficiency of the evidence to present an employment discrimination case to the jury. *Theard v. Glasco, Inc.*, 47 F.3d 676 (4th Cir. 1995)

(stating to avoid summary judgment, plaintiff had to prove not only that the reason the employer presented was false, but that discrimination was the real reason).

A number of circuits agree that there must be additional evidence, other than evidence of a prima facie case, and pretext evidence, in order to create a jury question. *See Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994)(stating the Supreme Court in Hicks did not mean prima facie case plus proof of pretext was always sufficient to present a jury question).

Other circuits have held that the elements of a prima facie case, plus evidence of pretext, are sufficient to create a jury issue. *See Gallo v. Prudential Residential Services*, 22 F3d 1219, 1224-25 (2d Cir. 1994) (stating intentional age discrimination may be demonstrated by reliance on the evidence that established the prima facie case and proof of pretext without necessity for any additional evidence).

The split in the circuits has been discussed by legal commentators. *See* Catherine J. Lanctot, Pretext-Plus After Hicks: The Circuit split remains, Wiley Employment Law Update 161 (1996); *C. Pledger, Rhodes v. Guiberson Oil Tools*; The Fifth Circuit's Approach to Pretext Evidence in Employment Discrimination, 57 LA. L. Rev. 1393; Catherine J. Lanctot, The Defedant Lies and the Plaintiff Loses: The Fallacy of the Pretext-Plus Rule in Employment Discrimination Cases, 43 Hastings L.J. 57 (1991).

Besides the split in the circuits, this Court should also review this case since the approach of the Fourth Circuit is inconsistent with the indirect evidence method of proof mandated by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804-05 1973, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), Hicks, 509 U.S. 502 (1993), and *Reeves v. Sanderson*. The theory underlying these cases is that an employer in an employment discrimination case will not ordinarily admit

employment discrimination, and because of the permissible inference of the ultimate fact of discrimination due to falsity of the employer's explanations. Because of the unavailability of direct evidence, this Court adopted the indirect burden-shifting method of proof. Requiring direct evidence (i.e., "pretext plus") cannot be reconciled with this Court's holdings in these cases.

II. CERTIORARI SHOULD BE GRANTED SINCE THE FOURTH CIRCUIT'S WEIGHING OF ALL THE EVIDENCE IS INCONSISTENT WITH THE APPROACH OF OTHER CIRCUITS WHICH CONSIDER ONLY THE EVIDENCE FAVORING THE NON-MOVANT, AND SINCE THIS APPROACH FAILS TO TAKE INTO ACCOUNT THIS COURT'S TEACHING IN *REEVES v. SANDERSON* THAT THE STANDARDS FOR JUDGMENT AS A MATTER OF LAW UNDER RULE 50 AND GRANTING SUMMARY JUDGMENT UNDER RULE 56 ARE THE SAME.

In granting the defendant's Motion for Summary Judgment the District Court found that Plaintiff had not shown the existence of material facts in dispute. In so finding, the court disregarded Plaintiff's evidence addressing both the issue of retaliation and proof of the falsity of the employer's information concerning the qualifications of the preferred employee versus his own qualifications. In holding that the Plaintiff's facts did not provide any "evidence" to the court that AT & T's promotion of the preferred employee was because of her race or gender, the Court applied an evidentiary standard which is the exclusive province of a jury. Whether the issues raised by Plaintiff are evidentiary, or whether the employer's proffered reasons are false, are issues of fact for a jury to decide, not the court. As this court held in Reeves, " . . . the standard for judgment as a matter of law

under Rule 50 mirrors the standard for summary judgment under Rule 56 . . . Thus, the court must review all of the evidence in the record . . . drawing all reasonable inferences in favor of the non-moving party, but making no credibility determinations or weighing any evidence. . . . The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court. . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." In this case, the Circuit Court disregarded the weight of the non-movant's evidence.

The Fourth Circuit's standard of review is inconsistent with other circuits, as well as *Anderson v. Liberty Lobby, Inc.*, and *Reeves v. Sanderson Plumbing Products, Inc.*, which hold that the standards for judgment under Rules 50 and 56 are the same. The Fourth Circuit's weighing of all the evidence, rather than determining only whether non-movant's evidence supports the verdict, is contrary to the rule in other circuits.

Even before Reeves, courts have held that the Rule 56 standard also applies under Rule 50. *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1263 (10th Cir. 1998) (stating standard for judgment as a matter of law is essentially identical to "genuine issue" requirement in summary judgment context).

If the Fourth Circuit had applied the Reeves teaching that the Rule 56 standard also governs Rule 50, the Court could not have granted a motion for summary judgment. The submission of false information by the employer clearly created "genuine issues of material fact".

III. THE SUPREME COURT SHOULD GRANT CERTIORARI SINCE A SERIOUS CONSTITUTIONAL QUESTION IS PRESENTED WITH RESPECT TO PROTECTION OF THE DUE PROCESS RIGHTS OF THE APPELLANT-/PETITIONER.

Article III, Section 1 of the United States Constitution provides that "The judicial Power of the United States, shall be vested, in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish". By logical extension, all inferior courts, including the Fourth Circuit Court of Appeals, are courts which must adhere to the rulings of the Supreme Court. As this court has held: The Supreme Court has broad supervisory power over judgments of lower federal courts. *U.S. v. Munsingwear, Inc.*, 71 S.Ct. 104, 340 U.S. 36, 95 L.Ed. 36 (1950); The Supreme Court has power to do justice as the case requires. *Tinder v. United States*, 73 S.Ct. 911, 345 U.S. 565, 97 L.Ed. 1250 (1953); The United States Supreme Court has plenary authority to make such disposition of the case as may be just under the circumstances. *Haynes v. U.S.*, 88 S.Ct. 722, 390 U.S. 85, 19 L.Ed. 2d 923 (1968). In the instant case, the Fourth Circuit Court of Appeals completely ignored this court's holding in *Reeves v. Sanderson*, but rather, apparently took the approach of the Fifth Circuit Court of Appeals which had been struck down by this court.

Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law. Black's Law Dictionary 500(6th ed. 1990). (emphasis

supplied). As this court has held: the fundamental requisite of due process is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest and to assert before the appropriate decision-making body the reasons for such choice. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 336, 70 S.Ct. 652, 94 L.Ed. 865 (1950). An unpublished nonprecedential decision in which no rationale or explanation is given neither meets this fundamental requisite nor affords the Appellant any right of controverting material facts which bear on the questions at issue in this case. The right of due process is denied thereby. Had the Fourth Circuit Court of Appeals applied the teachings of the Supreme Court's decision in *Reeves v. Sanderson* to the instant case, rather than mere rubber stamping, the Appellant's evidence would have received the proper weight thereby preserving his right of due process.

CONCLUSION

This case presents a serious due process question as well as a question of the role of the circuit courts and the role of the jury in employment discrimination cases. Since the courts of appeals have taken different approaches on the issue of this court's teachings regarding Rule 50 and Rule 56, review by this court is warranted.

Respectfully submitted,

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